REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga, CJ; Tunoi, Ojwang, Wanjala, Ndungu SCJJ.)

ADVISORY OPINION NO. 2 OF 2012

IN THE MATTER OF AN APPLICATION FOR ADVISORY OPINION UNDER ARTICLE 163 (6) OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF ARTICLE 81, ARTICLE 27 (4), ARTICLE 27 (6), ARTICLE 27(8), ARTICLE 96, ARTICLE 97, ARTICLE 98, ARTICLE 177(1) (b), ARTICLE 116, ARTICLE 125 AND ARTICLE 140 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE

-AND-

IN THE MATTER OF THE ATTORNEY-GENERAL (ON BEHALF OF THE GOVERNMENT) AS THE APPLICANT

ADVISORY OPINION

A. INTRODUCTION

[1] This Advisory Opinion relates to two discrete elements in respect of which the Attorney-General thus moved the Court:

> "The Advisory Opinion of the Court is sought on the following issues:
>
> *A. Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116 and*

Article 125 of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March, 2013?

B. *Whether an unsuccessful candidate in the first round of Presidential election under Article 136 of the Constitution or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?"*

[2] The learned Attorney-General annexed his depositions indicating the factual circumstances necessitating motion in the Supreme Court, on the matters in hand. He notes the principle in Article 81(b) of the Constitution: "not more than two thirds of the members of elective public bodies shall be of the same gender"; that in Article 81(d) which provides for "universal suffrage based on the aspiration for fair representation and equality of vote"; and that in Article 81(e) which provides for "free and fair elections." The Attorney-General notes the Bill of Rights safeguard for "equality and freedom from discrimination," in Article 27, in particular sub-Article 3 which declares that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." He states that the Constitution reposes positive obligations on the State to move by appropriate instruments to lay the necessary

equality-rendering structures; he cites Article 27(6) which thus provides:

> *"To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative* ***and other*** *measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."*

The foregoing provision gives a discretion to be exercised by the State in good faith and in a progressive manner; it thus stipulates in sub-Article (7):

> *"Any measure taken under clause (6) shall adequately provide for any* ***benefits to be on the basis of genuine need****."*

In that same spirit, Article 27(8) imposes upon the State the obligation to redress gender disadvantage:

> *"In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement* ***the principle*** *that not more than two-thirds for the members of elective or appointive bodies shall be of the same gender."*

[3] The Attorney-General in his affidavit, signals both *guiding principles*, and *quantized rights and claims*, running in parallel, in the safeguards of the Constitution. For instance, Article 38(1) states the broadly-ascertainable entitlement: "Every citizen is free to make political choices" – which includes the

right "to form or participate in forming a political party", "to participate in the activities of, or recruit members of, a political party", "to campaign for a political party or cause." That runs alongside the strictly-ascertainable right provided for in Article 38(3): "Every adult citizen has a right....to be registered as a voter; ..... to vote by secret ballot...."

[4] Of the place of *broad principle* in the Kenya Constitution, the Attorney-General recalls the terms of Article 10, on "national values and principles of governance"; he remarks the hortatory as well as obligatory tone attached to new situations facing government:

> *"The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them –*
>
> *(a) applies or interprets this Constitution;*
>
> *(b) enacts, applies or interprets any law; or*
>
> *(c) makes or interprets public policy decisions [Article 10(1)]."*

[5] The Attorney-General sets the provisions regarding membership of the Legislature against the principles of governance declared in the Constitution. He notes that Article 97(1) prescribes as membership of the National Assembly:

> *(a) 290 members elected in single-member constituencies;*
>
> *(b) 47 elected women representatives from each county;*

(c) 12 special interest-group members nominated by the ***political parties;***

(d) the Speaker.

And the Attorney-General sets out the prescribed membership of the Senate [Article 98(1)]:

(a) 47 elected members representing each county;

(b) 16 women ***nominated by the political parties****;*

(c) 2 members – a man and a woman, representing the youth;

(d) 2 members – a man and a woman, representing persons with disabilities;

(e) the Speaker.

[6] The gravamen of the Attorney-General's application now emerges clearly. He perceives an inconsistency – or potential inconsistency – between the equality principles contained in Article 27 of the Constitution, and the specific provisions on membership of the National Assembly and the Senate, as provided in Articles 97 and 98. This perception is the factual matter that, in the Attorney-General's deposition, gives cause to move the Supreme Court to render an ***Advisory Opinion.***

[7] The Attorney-General apprehends that "*there is no guarantee that the number of nominated persons from the lists of nominees provided by the political parties will ensure that at least one-third of the members in each House*

will be of one gender."

[8] There is a foundation to the Attorney-General's qualms. The uncertainty left in Articles 97 and 98 of the Constitution are not repeated in the case of *County Assemblies* [Article 177], in respect of which the two-thirds-and-one-third rule is clearly provided for.

[9] The Attorney-General's concern, and his further reason for seeking this Court's Advisory Opinion, is that recent superior Court decisions have had a bearing on the principle of gender equality: and therefore, a *state of uncertainty* in the law prevails which the ultimate Court should lay to rest.

[10] The Attorney-General deposes that it was not, in the nature of the matter, possible for him to resolve the likely contentions on questions of law, and it thus became necessary to seek an Advisory Opinion, in time before the institution of the next Legislature through the *electoral process* due to take place on ***4 March 2013.***

[11] The second question referred to this Court by the Attorney-General is on a potential sphere of dispute, in the *Presidential election* due to take place on ***4 March 2013.*** The relevant depositions run as follows:

> *"That Article 163(3)(a) of the Constitution of Kenya provides that the Supreme Court shall have exclusive original jurisdiction to hear and determine disputes relating to the office of the President arising under*

Article 140.

"That Article 140(1) provides that a person may file a petition in the Supreme Court to challenge the election of President-elect within seven days after the date of declaration of the results of the Presidential election.

"That, however, there is a question as to whether an unsuccessful candidate in the first round of the Presidential election under Article 136 of the Constitution is or is not entitled to petition the Supreme Court to challenge the outcome [of the] said election under Article 140.

"That there exists a lacuna in the Constitution as to what process should be followed to resolve any possible controversy that might arise: for example, challenging the results in the first round of a Presidential election should there not be a clear simple-majority winner. There is no clear indication [of the mode of] resolution of disputes from the first round of Presidential election. There is no express right to bring an election petition over a run-off. What happens where the runner-up position is contested, for instance?"

B. PARTIES AND AMICI CURIAE

[12] The subject of this Advisory Opinion is one of *general public interest*. Thus, on the occasion of mention, on 8 November 2012 several bodies sought and were admitted to interested-party status: the Commission on the Administration of Justice (CAJ); the Independent Electoral and Boundaries Commission (IEBC); the Commission on the Implementation of the Constitution (CIC); and the National Gender and Equality Commission (NGEC). On the same occasion the following were admitted as ***amici curiae***: the Centre for Rights Education and

Awareness (CREAW); the Katiba Institute; the Centre for Multi-party Democracy (CMD); FIDA-Kenya; the Kenya Human Rights Commission (KHRC); the International Centre for Rights and Governance (ICRG); and Mr. Charles Kanjama, Advocate.

C. CONTEST TO JURISDICTION

[13] Several ***amici curiae*** objected to the Attorney-General's application on grounds of jurisdiction. Learned counsel Mr. Kanjama, in agreement with counsel for CREAW (Ms. Thongori and Mr. Ongoya) and CMD (Mr. Mwenesi and Ms. Kimani), urged that the gender question in the electoral process concerned *national government* exclusively and was unrelated to *county government* – and hence, by the authority of this Court's earlier decision, ***In the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Civil Application No. 2 of 2011, is not proper matter for an Advisory Opinion.

[14] It was the position of both CREAW and CMD that moving this Court for an Advisory Opinion was an abuse of process: for the Attorney-General had not stated whether, as the Government's principal legal advisor, his opinion on the question had been sought and if so, what opinion he had given, and what redressive action had been taken on the basis of his opinion. It was CREAW's position, further, that the Attorney-General's motion was occasioned by no dilemma in his line of duty, as he still has on Parliament's agenda two separate Bills seeking implementation of the gender rule.

[15] The Attorney-General's response was that the Supreme Court, under Article 163(6), has a discretionary jurisdiction to give an Advisory Opinion at the request of the National Government, any State organ, or County Government with respect to any matter concerning county government: a jurisdiction already defined in ***In the Matter of the Interim Independent Electoral Commission***, Sup. Ct. Constitutional Application No. 2 of 2011.

[16] The Attorney-General's position is supported by learned counsel, Mr. Nowrojee who represented IEBC; he urged that matters of national and of devolved government are closely intertwined. Mr. Nowrojee gave the example of Articles 110 and 111 of the Constitution which lay down the procedures for the passing of Bills "concerning county governments"; such Bills have to be deliberated upon and enacted by the *National Assembly* and the *Senate*.

[17] In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court's Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court *litigation*. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing "rich jurisprudence that respects

Kenya's history and traditions and facilitates its social, economic and political growth."

[18] The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes: as the Court must be disinclined to take a position in discord with core principles of the Constitution, in particular, a principle such as the *separation of powers*, by assuming the role of general advisor to Government.

[19] The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court's Advisory-Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an opinion in accordance with the Constitution.

[20] We have no doubt that the issues upon which an opinion has been sought, are indeed matters of *county government*. The gender composition of both the National Assembly and Senate, if it could touch on the constitutionality of these

organs, is an issue bearing impact on county government. The Court had on this question, in ***In the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Constitutional Application No. 2 of 2011, held electoral matters to be matters of county government:

> *"On the question whether election date is a matter of "county government', we have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to us that an independence of national and county governments is provided for through a devolution-model that rests upon a unitary, rather than a federal system of government....[We] have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government), deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county levels...dovetail into each other and operate in unity."*

[21] The Court came, in the earlier instance, to the conclusion that the question as to when the general elections would be held was central to county government – and so, belonged to the jurisdiction of the Court in respect of Advisory Opinions.

[22] By the same token, we hold the opinion that the two questions referred to

this Court by the Attorney-General are of such a nature as to bring the reference within the ambit of matters that qualify for this Court's Advisory Opinion.

[23] Learned counsel Ms. Thongori and Mr. Nderitu, while not disputing the jurisdiction of this Court, have asked that we should nonetheless, decline to render an Advisory Opinion: for the reason that it was not a plain opinion being sought but rather, a precise *interpretation of the law*, which should be a matter for regular dispute settlement.

[24] It is not our perception, however, that all the Attorney-General seeks is an *interpretation* of Article 81(b) of the Constitution. In fact, the Attorney-General has moved this Court seeking an opinion as to whether the terms of Article 81(b) apply in respect of the very next general elections, to be held on 4 March 2013, or on the contrary, apply *progressively* over an extended period of time.

[25] It is clear to us that this Court, while rendering Advisory Opinion, will almost invariably engage in the exercise of constitutional interpretation, and it is not precluded from such an exercise. It does not follow, therefore, that the Court will decline a proper request for an Advisory Opinion, merely because rendering such opinion will entail constitutional interpretation. The basic requirement for an application for an opinion is that it should, as contemplated by Article 163(6) of the Constitution, be seeking to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest.

[26] The Attorney-General's request for an Advisory Opinion, in our view, raises issues of great public importance. The forthcoming general elections are not only the most important since independence, but are complex and novel in many ways. The elections come in the context of the first progressive, public-welfare-oriented, historic Constitution which embodies the people's hopes and aspirations. Not only are these elections one of the vital processes instituted under the Constitution, but they constitute the *first act of establishing a whole set of permanent governance organs*. Clearly, any ambivalence or uncertainty in the path of such crucial elections must, as a matter of public interest, be resolved in time: and the task of resolution rests, in the circumstances prevailing, with the Supreme Court, by its Advisory-Opinion jurisdiction.

D. GENDER EQUITY IN THE MEMBERSHIP OF THE LEGISLATURE: MUST REALIZATION BE IMMEDIATE? OR PROGRESSIVE?

[27] It was the Attorney-General's submission that no consensus has been achieved thus far, in the interpretation of Articles 81(b) as read with Articles 27(6), 27(8), 96, 97, 98, 177(1), 116 and 125 of the Constitution, and that these articles were silent on *effective dates*. Moreover, the Attorney-General urged, there are divers interpretations of the said provisions – leading to the likelihood that the gender quotas may not be realized during the general elections of 4 March 2013. Such a prospect, the Attorney-General urged, may lead to a constitutional crisis, with the possibility of the National Assembly being declared

unconstitutional.

[28] The learned Attorney-General submitted that the full and timeous fulfilment of the gender-equity principle rests on a diverse foundation that does not fall to the charge of one agency. The role of *political parties* is central; and appropriate legislative arrangements are required under the Political Parties Act, 2011 (Act No. 11 of 2011) and the Elections Act, 2011 (Act No. 24 of 2011). Yet, as of now, the two enactments have provided no mechanisms for the implementation of the gender-equity principle. Although the Attorney-General has endeavoured to address the gender-representation problem, neither of his proposed amendments to the Constitution [by way of the Constitution of Kenya (Amendment) Bill, 2011 and the Constitution of Kenya (Amendment) Bill, 2012] has been tabled and passed by the outgoing Parliament, the tenure of which expires soon, and earlier than the forthcoming elections-date.

[29] The Attorney-General asked the Court to give meaning to a relevant word that creates the gender-equity principle, in Article 81 of the Constitution; it thus provides:

> *"The electoral system **shall** comply with the following principles –*
> *(a) ....*
> *(b) Not more than two-thirds of the members of elective public bodies shall be of the same gender..."*

The Attorney-General urges that, depending on how this Court, in proper context, interprets the word "shall", an authoritative position would crystallize on whether the two-thirds-one-third gender-equity rule in the national legislative agencies, is for *immediate,* or phased-out (or *progressive*) implementation. He submitted that the meaning of the word "shall" is not cast in stone.

[30] The Attorney-General submitted that as a consequence of the *uncertainty of language* in the Constitution's gender-equity clauses, there is only one certainty: that, by Article 97(1)(b), the mandatory number of those of the female gender to form part of the National Assembly's membership is ***13.4 percent***. Thus, if the electorate in its uninhibited mode, should fail to elect women in numbers satisfying the gender-equity rule, the only way to comply with prescribed equity-fractions would be through *nominations*. Nominations on those lines would automatically raise the membership figure of the national legislative bodies well *beyond the prescriptions of the Constitution*. So there would be a conflict between the Constitution's terms on *gender proportions*, and its terms on the *overall numerical strength* of these organs. Besides such contretemps in fundamental principles, the Attorney-General urged, unduly-large national legislative bodies would place the citizen under an undue *tax burden*. Upon weighing such imponderables attendant on an all-new Constitution, the Attorney-General commended an interpretation that supports a *progressive*

realization of the gender-equity principle in elective representation, for the central legislative agencies.

[31] The Attorney-General's stand is not agreeable to most of the interested parties and the ***amici curiae***. (An exception is to be made for IEBC, which is willing to adopt any position conscientiously adopted by this Court). They urge that the implementation of the gender-equity principle must take place *immediately*.

[32] CAJ, through its chief officer, Mr. Amollo, takes a lone stand, as follows. *In principle,* the gender-equity rule should be given immediate effect. However, it is to be realized that imprecision in the language of the Constitution occurred at the last stages of negotiating the provisions. Parliament itself, Mr. Amollo proposes, should, within certain *phased-out time frames*, take action to give meaning to the gender-equity principle. He invokes Article 100 of the Constitution, which provides that:

> "*Parliament shall enact legislation to promote the representation in Parliament of –*
>
> *(a) women;*
> *(b) persons with disabilities;*
> *(c) youth;*
> *(d) ethnic and other minorities; and*
> *(e) marginalized communities."*

Mr. Amollo urges that Parliament, which bears an *obligation to enact legislation* to promote the representation of women, has a *five-year leeway under the Fifth Schedule to the Constitution*. He asks the Court to require that the *five-year legislation span* be complied with and that, within that time-frame, the one-third, two-thirds gender-equity principle be realized.

[33] Such a compromise does not feature in the submissions by CIC and CMD. Their Advocates (M/s. Aruwa and Ligunya for the former; Mr. Mwenesi and Ms. Kimani for the latter) contend that there never was any controversy as to the interpretation of Article 81(b) of the Constitution which states that "not more than two-thirds of the members of elective public bodies shall be of the same gender." Counsel urge that, as to the immediacy of implementation of the gender rule, the position was always clear to the Attorney-General: as there had been a series of consultative meetings running from May 2011 to September 2012, involving civil society, parliamentary representatives and members of the Executive, on the issue of the implementation of Article 81(b). It had always been CIC's and CMD's understanding that the terms of Article 81(b) were for implementation during the general elections of 4 March 2013. Counsel submitted that to interpret the relevant provisions as requiring progressive realization would be inconsistent with a holistic reading of the Constitution; and he invoked, to that intent, a passage in the Ugandan case, ***Olum v. The Attorney-General***

of Uganda [2002] E.A. 508 [the principle of which had been relied on by Majanja, J in ***U.S.I.U. v. Attorney-General & Another*** [2012] eKLR]:

> *"[T]he entire Constitution has to be read as an integrated whole and no particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.*

[34] Learned counsel Mr. Mwenesi, for CMD, expressed disagreement with the CAJ position: that it should take Parliament as much as two election cycles to attain compliance with the gender-equity principle. Learned counsel, while acknowledging the *five-year leeway* for Parliament to comply, states a case based on foreboding: that as the said five-year period expires on ***27 August 2015,*** Parliament *runs the risk of being declared unconstitutional* as from that date.

[35] Another ***amicus curiae***, Katiba Institute argues in favour of immediate realization of the gender-equity principle: for the very principle running through the Bill of Rights, of *non-discrimination*, indeed, demands *equal* sharing in the elective assemblies, as between the male and the female gender. Learned counsel, Mr. Sing'oei, for Katiba Institute, urged that this Court do start from the foundation that the one-third reserved gender representation is only *the minimum;* and that the functioning of progressivity has to begin from that threshold. Counsel impeaches *Parliament's tardiness* in passing law to promote

the representation of women in accordance with the terms of Article 100(a) of the Constitution. What is the effect of a possible delayed action by an elected body, in terms of the crystallization of rights such as may be claimed by individuals, or social groups? This specific jural question is not addressed by counsel. But Mr. Sing'oei still urged that Parliament's delays are untenable, and must give way to asserted rights: women being held *entitled* to equal representation in the elective national constitutional organs. For such "delays", counsel submitted, the Court should *hold Parliament's conduct to be unconstitutional*. Counsel did not, however, commit himself as to whether an elective body suffering from the effects of alleged legislative tardiness should be regarded as *unconstitutional*. Yet this, as we will later signal, is an issue of fateful significance, in terms of the sustainability of the constitutional order itself.

[36] Those interested parties and ***amici curiae*** who objected to the principle of progressivity in the realization of gender-equity in the national elective bodies, contend that the notion of progressivity where relevant under the Constitution, has clear application only with regard to *social and economic rights* under Article 43; and with regard to *persons with disabilities* under Article 54. It was contended that the Constitution does not associate the principle of progressivity with regard to the *conduct of elections*, or the *proscription of gender discrimination* as contemplated in Article 27(6) and (8).

[37] To reinforce the case against progressivity as a principle in the realization of gender equity in the national elective bodies, the National Gender and Equality Commission invokes the imperative of safeguarding the *separation of powers*. NGEC, through its counsel M/s. Nyaoga and Imende, contend that the ground-operations in developing standards and functionalizing the gender rule are reposed in the *Executive,* the Court being left only with the single-event task of adjudging upon *compliance or breach*; and that, for the Supreme Court, the *sole task* is to give effect to the fundamental rights and freedoms, the values and principles of governance, as declared in the Constitution.

[38] Both the Commission on the Administration of Justice and Katiba Institute favour a relatively interventionist approach by the Judiciary, for the purpose of ensuring the protection of the marginalized; they urge that the female gender has, historically, been marginalized by the political system, and that to this social category, the Court should be guided by goals of "substantive equality".

[39] Mr. Mwenesi, for CMD, submits that it is an instance of discrimination, that the Government should *fail to introduce appropriate legislation* to secure gender equity in the State's national elective bodies; such an omission offends the safeguard of Article 27(1) of the Constitution, which stipulates that "*Every person is equal before the law and has the right to equal protection and equal benefit of the law";* or Article 27(3) which provides that "*Women and men have the right to*

equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."

[40] Counsel's powerful argument on the safeguards for equality and freedom from discrimination, however, proceeded on the premise that the rights in question are cut-and-dried and fully vested, so that in respect of them, right and wrong spoke for itself; no legal argument was advanced on the basis that the Constitution's guarantees were wholly new, and would have to be implemented in a progression beginning from the *status quo* of the yesteryear. This element in counsel's submissions, in our opinion, bears a forensic shortfall that must be taken into account in rendering this Advisory Opinion.

[41] It was CMD's position that the Attorney-General, by calling for a progressive approach to the gender-equity principle, was seeking *to limit a right guaranteed under Article 27 of the Constitution* – and so he must first fulfil the terms of Article 24 which stipulates that:

> *"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors....."*

Mr. Mwenesi submitted that no such limitation could be allowed, because the Attorney-General *had not secured the enactment of a law* to impose the

proposed limitation. This argument, however, does not address the Attorney-General's essential argument: that there is a series of provisions in the Constitution itself that lacks harmony as to the *scope and time-span* of the guarantees made. The contest, in this regard, is conducted at cross-purposes: and the Court must set its sights on, firstly, the *clear intent of all the safeguards*, and secondly, the manifest matter of judicial notice – that implementation of the guarantees commences from a pre-Constitution *status quo*, into the transformative phase of the new constitutional order.

[42] CMD has further built its case on the terms of Article 4 of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) which thus provides:

> *"1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."*

CMD has clearly taken the position that such variable, discretionary, regulatory approaches to gender equality, do place positive obligations on the Kenyan State, by virtue of the current Constitution. Although such a stand calls for explication, CMD merely asks the Court to place a duty on Parliament and the Attorney-

General to employ appropriate provisional measures to eliminate gender discrimination. Such an obligation, as Mr. Mwenesi submitted, is lodged in the Constitution by the fact that CEDAW has been adopted under Article 2(6) which provides that –

> *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."*

[43] ICRG takes a different position: that the equality and anti-discrimination rights set out under Article 27 of the Constitution are not, in essence, crystallized rights for any *particular mode of application,* but are in the nature of principles to guide public actions.

[44] In summary, two distinct and contrasted approaches have emerged, in relation to the applicability of Article 81(b) of the Constitution as read alongside other provisions. The first contends that Article 81(b) as read with other Articles requires a "progressive realization" of the enforcement of the ender-equity rule. The implication is that the rule need not be implemented *during the general elections of* ***4 March 2013****,* but that it has to be implemented or realized *in stages, through legislative, policy-making, and other measures.*

[45] In direct opposition to the foregoing approach, it is contended that the one-third gender rule embodied in Article 81(b) of the Constitution must be realized *immediately* and at the general elections of 4 March 2013.

[46] We have benefited from the learned submissions of counsel, and on that basis we re-examine the question: *whether Article 81(b) as read with other provisions of the Constitution requires a progressive realization of the one-third gender rule, or requires the same to be implemented during the general elections of* ***4 March 2013?***

[47] This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned counsel Ms. Thongori aptly referred to this phenomenon as "the socialization of patriarchy"; and its resultant diminution of women's participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of "national values and principles of governance" [Article 10].

[48] From the foregoing facts, arguments and standpoints, this Court, by a majority, has identified the broad concerns which it should bear in mind, in rendering an Advisory Opinion.

These are as follows:

(a) What constitutes the "*progressive realization of a right?*"

(b) How should *general principles* declared in the Constitution be interpreted, in determining the content, and scheme of enforcement of safeguarded rights?

(c) Is it appropriate to treat the general guiding principles in the Constitution in the same way as *specific, quantized rights* declared in the same Constitution?

(d) Where the Constitution requires the Legislature (or any other organ) *to take certain steps for the realization of a particular rights* or welfare situation, how is such to be timed? does the Legislature have a discretion?

(e) Suppose such a requirement is placed on a collective, programme-bound and life-time-regulated organ such as the National Assembly, can the right be *presumed to have crystallized*, notwithstanding that no legislative measure was passed – on the principle that there has been some intolerable default?

(f) Suppose the default in realizing the gender-equity principle is more directly occasioned by the pre-election process, by the actions of *political parties* which are essentially political organizations, would the resultant elected-assembly be adjudged to stand in violation of the terms of the Constitution?

(g) Under what circumstances is the Constitution's prescribed membership-quota amenable to *immediate* or to *progressive* realization? Does interpretation in

favour of a progressive application contradict the principle of the holistic implementation of the Constitution?

(h) Is it the case that the interpretation calling for progressivity offends the constitutional principle of *separation of powers*, because the Judiciary has no role in standard-setting and implementation which are to be restricted to the Executive Branch?

(i) Can it be contemplated that an interpretation favouring the immediate realization of the gender-equity principle, could lead to the inference that the National Assembly or Parliament, as constituted following the general elections of March 2013, is unconstitutional?

(j) Considering that the Supreme Court, by the Supreme Court Act, 2011 (Act No. 7 of 2011) is required to [s.3(a)] "assert the supremacy of the Constitution and the sovereignty of the people of Kenya", how would this Court, in the instant case, perform its role as the guardian of the public interest in constitutional governance by declaring the parliamentary pillar of the constitutional order to be a nullity? How could the constitutional order, in such circumstances, be saved? How would the sovereignty of the people be secured against a possible governance vacuum?

E. PROGRESSIVE REALIZATION OF A RIGHT

[49] The concept of "progressive realization" is not a legal term; it emanates from

the word "progress," defined in the ***Concise Oxford English Dictionary*** as *"a gradual movement or development towards a destination*." Progressive realization, therefore, connotes a *phased-out attainment of an identified goal*. The expression gained currency with the adoption of the Universal Declaration of Human Rights in 1948 – and this landmark international instrument stepped up the growth of the "human rights movement," worldwide. The legal milestones in this development were later marked by other instruments: such as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Political Rights (ICESCR). Such instruments introduced a set of expressions that has become part of the standard language of international human rights jurisprudence. Such language entails no technicality, but is simply concerned to prescribe the extent of a State's obligation in the realization of rights embodied in the human rights Conventions.

[50] Article 3 of the ICCPR states that:

> *"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."*

On the same lines, Article 2 of the ICESCR thus states:

> *"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available*

resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[51] Article 3 of the Convention on the Elimination of All forms of Discrimination Against Women, 1981 (CEDAW) states that:

"States Parties shall take in all fields, in particular in political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men."

[52] It is clear to us that the Constitution of Kenya, 2010 which generously adopts such language of the international human rights instruments, draws inspiration from them.

[53] We believe that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, *a certain set of supportive measures are taken* by the State. The Exact shape of such measures will vary, depending on the *nature of the right in question,* as well as *the prevailing social, economic,*

cultural and political environment. Such supportive measures may involve *legislative, policy* or *programme* initiatives including *affirmative action*.

[54] Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards *express safeguards* and *public commitment*. But the *Kenyan Constitution fuses this approach with declarations of general principles and statements of policy*. Such principles or policy declarations signify a *value system*, an *ethos,* a *culture,* or a *political environment* within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that *contributes to the development of both the prescribed norm and the declared principle or policy;* and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner *as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.*

[55] It is on the basis of the foregoing principles, that we will consider the gender-equity question under the Constitution. The Constitution has prescribed certain gender minima to be met in both *elective* and *appointive* public bodies. These quotas are to be seen as a *genre* of affirmative-action programmes, aimed at redressing the social aberrations and injustices of the past. Thus, membership of certain Constitutional Commissions is subject to certain gender prescriptions. It is provided as regards the Judicial Service Commission [Article 171(2)], that membership shall consist of:

> *"……*
>
> *(d) one High Court judge and one magistrate, one a woman and one a man…*
>
> *(f) two advocates, one a woman and one a man…*
>
> *(h) one woman and one man to represent the public interest…."*

[56] The foregoing example demonstrates that, so far as the Judicial Service Commission is concerned, it is for certain that the gender-equity rule of one-third-to-two-thirds is *immediately* realizable. The normative prescription is clear, and readily enforceable; the required numbers of male and female members are specified, and the mechanism of bringing them to office clearly defined.

[57] The Judicial Service Commission is both an *appointive* and *elective* body. As there is clear provision on how the women members are to be elected, the

Commission will always have a minimum of ***three*** women out of eleven members: which falls short of the one-third-to-two-thirds gender rule. But were the female membership of the Commission to rise to ***four*** out of eleven, then there would be *no basis* for claiming the existence of any breach of the terms of the Constitution. But what provisions dictate that the number of female members of the Commission *must rise from at least three to the figure of four*? By Article 27 (8) of the Constitution, failing a purely providential attainment of the figure of *four,* the *State's duty* would be *to take "legislative and other measures" to have the number of women-members raised accordingly*.

[58] From the foregoing example, it is clear that the realization of a female membership for the Judicial Service Commission, of ***three***, is *immediate*; but the attainment of the number of ***four*** is *progressive*, being dependent on the State's *further action.*

[59] This leads us to the inference that whether a right is to be realized "progressively" or "immediately" is not a self-evident question: it *depends* on factors such as the *language* used in the normative safeguard, or in the expression of principle; it depends on the *mechanisms* provided for attainment of gender-equity; it depends on the *nature of the right* in question; it depends on the *mode of constitution* of the public body in question (e.g. appointive or elective; if elective, the mode and control process for the election); it depends on the identity and character of the *players who introduce the candidates* for

appointment or election; it depends on the *manner of presenting candidature* for election or nomination.

F. IMMEDIATE REALIZATION OF THE GENDER-EQUITY RULE, AND FOR GENERAL ELECTIONS OF MARCH 2013?

[60] The proponents of immediate implementation of the gender-equity rule have placed a premium on the terms of Article 81(b) of the Constitution, in particular its adoption of the word "shall":

> *"not more than two-thirds of the members of elective public bodies* ***shall*** *be of the same gender."*

The assumption made is that the term "shall" connotes a *mandatory obligation*, so the rule must be enforced immediately. This contention was a factor in the Attorney-General's mind, and he faced it by urging that the word "shall" as applied in Articles 81(b) and 27(8) of the Constitution, in fact, bore a "permissive" connotation and, therefore, the one-third gender rule was for progressive realization.

[61] After considerable reflection upon this point, we have come to the conclusion that the expression "progressive realization", as apprehended in the context of the human rights jurisprudence, would signify that there is no mandatory obligation resting upon the State to take *particular measures*, at a *particular time*, for the realization of the gender-equity principle, save where a time-frame

is prescribed. And any obligation assigned in mandatory terms, but involving *protracted measures*, legislative actions, *policy-making* or the *conception of plans* for the attainment of a particular goal, is not necessarily inconsistent with the *progressive realization* of a goal. This position does not change, notwithstanding that the word "*shall"* may have attended the prescription of the task to be performed by the State. The word "shall" in our perception, will translate to immediate command only where the task in question is a cut-and-dried one, executed as it is without further moulding or preparation, and where the subject is *inherently disposable* by action emanating from a single agency. But this word "shall" may be used in a different context, to imply the broad obligation which is more institutionally spread-out, and which calls for a chain of actions involving a plurality of agencies; when "shall" is used in this sense, it calls not for immediate action, but for the *faithful and responsible discharge of a public obligation*; in this sense, the word "shall" incorporates the element of management discretion on the part of the responsible agency or agencies.

[62] The word "shall", in this new dimension, has gained currency in current human rights treaties, essentially to address the tendency on the part of States Parties to resile from their obligations to institute implementation measures. From that analogy, we perceive the word "shall" as an emphasis on the *obligation to take appropriate action*, in the course of the *progressive realization of a right conferred by the Constitution*.

[63] Relevant example is afforded by Article 7 of CEDAW, which thus states:

> *"States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and in particular, shall ensure to women, on equal terms with men, the right:*
>
> *(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;*
>
> *(b) To participate in the formation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;*
>
> *(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country."*

We have asked ourselves whether the use of the word "shall", in that instrument, can by itself eliminate discrimination against women in the political and public life *immediately*. Even though the word "shall" has been sued, it is clear to us that the objectives to be attained through State action are of such a nature that they can only be realized *progressively*. Indeed, the Convention places a duty on the State Parties, in their regular reports to the managing committees, to announce the measures which they have taken *over a certain period of time*, for the purpose of attaining the specific goal.

[64] Article 27(8) of the Constitution leaves no doubt that its language is distinctly inspired by that of the United Nations Conventions; it states:

> *"In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."*

And the said clause (6) thus states:

> *"To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."*

Since the task is expressed as "to give full effect", it follows that the rights in question, which are civil and political in nature, are not capable of *full realization* unless the State takes "certain specified measures." Such *unspecified measures*, it is clear to us, can only be taken *in stages, over a period of time*, and by means of positive and good-faith exercise of *governance discretion*.

[65] We take judicial notice that the passage of legislation ["legislative measures"] to redress an injustice, or to deliver public goods, is not the single execution-oriented act that can be discharged immediately upon command; it is,

inherently, a *process* and must run over time, in the context of supportive measures, and responsible exercises of discretion. It involves the conduct of studies, and the development of legislative proposals. Indeed, by the Constitution, the development of legislation is no longer the preserve of Parliament, or the legal draftspersons in the State Law Office; *public participation* in the legislative process is a constitutional imperative.

[66] Affirmative action programmes require careful thought, multiple consultations, methodical design, co-ordinated discharge. Such measures cannot, by their very nature, be enforced *immediately*.

[67] It was argued for some of the parties and ***amici curiae*** that the progressive approach to the realization of certain rights is not tenable: because only the economic and social rights provided for in Article 43 of the Constitution are amenable to the progression mode. It was contended that for the Article 43-type of rights, what is at stake is resource outlay; whereas, for rights such as gender-equity rights, the question is only the political will: so the Courts should merely make orders requiring a progressive political will. We are not persuaded by this reasoning. We take judicial notice that women's current disadvantage as regards membership of elective and appointive bodies, is accounted for by much more than lack of political will. It arises from deep-rooted historical, social, cultural and economic-power relations in the society. It thus, must take much more than the prescription of gender quotas in law, to achieve effective inclusion of women

in the elective and appointive public offices. For the female gender to come to occupy an equitable status in civil and political rights, the State has to introduce a wide range of measures, and affirmative-action programmes. It is not the classification of a right as economic, social, cultural, civil or political that should suit a particular gender-equity claim to the progressive mode of realization; it is the inherent *nature of the right*, that should determine its mode of realization. It is relevant in this regard, that Article 27(8) of the Constitution calls for "legislative and *other* measures" to be taken by the State, for the realization of the gender-equity rule. That such "other measures" are generic, underlines the draftsperson's perception that the categories of actions, by the State, in the cause of gender-equity, are *not closed*.

[68] We are concerned by the fact that none of the counsel who urged the immediate enforcement of the gender-equity rule, devoted their attention to the inherently different paths of enforcement for a specific, accrued right on the one hand, and a broad, protective principle on the other. It is clear to us that Article 81 of the Constitution, which bears the heading "general principles for the electoral system", is a statement of *general principles*; these principles underpin the electoral system under which general elections are to be conducted on 4 March 2013; the gender-equity principle in Article 81(b), regarding the one-third-and-two-thirds criterion, does not stand alone, but is one of a set of principles; the general principles interlock with and operate in common with other

provisions in Articles 81-92 of the Constitution. The relevant Chapter [7] of the Constitution is concerned with "Representation of the People", and Article 81 is about the "electoral system" and "public elective bodies." "Electoral system", in this regard, means the policies, laws, regulations, processes, environment and institutions that determine the conduct of elections in Kenya; and "public elective bodies" refers to all public institutions the composition and membership of which is determined through some form of election. Thus, Article 81 is not confined to the *National Assembly*, the *Senate,* or *County Assemblies*; it contemplates all public bodies properly so-called, which hold elections for their membership. In this context, it is clear to us that the principle in Article 81(b) of the Constitution is a statement of *aspiration*: that wherever and whenever elections are held, the Kenyan people expect to see mixed gender.

[69] Counsel, on the contrary, urged that the terms of Article 81(b) signify a concrete right, the content of which is ascertainable and capable of single-act implementation. As already remarked in this Opinion, Kenya's Constitution carries both *specific normative prescriptions*, and *general statements of policy and principle:* the *latter inspire the development of concrete norms for specific enforcement; the former* ***can*** *support the principle maturing into a specific, enforceable right.*

[70] We consider that **Article 81(b),** which stands generally as a *principle,* would only transform into a specific, enforceable right *after it is supported by a*

concrete normative provision. What is the exact status of **Article 81(b)?** It is, at this stage, *to be read together with Article 177*, on *"Membership of county assembly"*: and this leads us to the conclusion that, as regards the *composition of county government*, Article 81(b) has been transformed into a *specific, enforceable right*.

[71] When, however, we examine Article 81(b) in the context of **Articles 97** [on membership of the National Assembly] and **98** [on membership of the Senate], then we must draw the conclusion that *it has not been transformed into a full right,* as regards the composition of the National Assembly and Senate, capable of *direct enforcement*. Thus, in that respect, Article 81(b) is not capable of *immediate realization*, without *certain measures* being taken by the State. Article 81(b) is also not capable, in our opinion, of replacing the concrete normative provisions of ***Articles 97*** *and* ***98 of the Constitution***: these two Articles prescribe in clear terms the composition of the National Assembly and the Senate. For Articles 97 and 98 to support the transformation of Article 81(b) from *principle* to *right,* the two would have to be *amended* to incorporate the element which learned counsel, Mr. Kanjama referred to as the "hard gender quota." In the alternative, a *legislative measure* [as contemplated in Article 27(8)] would have to be introduced, to ensure compliance with the gender-equity rule, always taking into account the terms of **Articles 97** and **98** regarding *numbers in the membership of the National Assembly and the Senate*.

[72] Neither course of adjustment to Article 81(b) of the Constitution falls within the competence of the *Judicial Branch*; it is for action lying squarely within the domains of the *Legislative* and *Executive* Branches of Government, supported by *other proper organs* such as the relevant Constitutional Commissions.

[73] Only an *adjustment to Article 81(b)* following the path we have described above, will fall within the terms of the main clause in **Article 81,** that "the electoral system shall comply with [the principles enumerated in paragraphs (a) – (e) of the Article]."

G. OPINION ON THE GENDER-EQUITY QUESTION

[74] As Article 81(b) of the Constitution standing as a *general principle* cannot replace the specific provisions of Articles 97 and 98, not having ripened into a specific, enforceable right as far as the composition of the National Assembly and Senate are concerned, it follows – and *this is the burden of our Opinion on this matter* – that ***it cannot be enforced immediately***. If the measures contemplated to ensure its crystallization into an enforceable right are not taken before the elections of 4 March 2013, then it is our opinion, Article 81(b) will ***not*** be applicable to the said elections. The effect is that Article 81(b) of the Constitution is amenable only to *progressive realization* – even *though it is immediately applicable in the case of County Assemblies under Article 177.*

[75] That leaves open the question: if Article 81(b) is not applicable to the March 2013 general elections, in relation to the national legislative organs, then *at what stage* in the succeeding period should it apply?

[76] Learned counsel, Messrs Aruwa and Mohammed called our attention to the pertinent terms of Article 20(3) (a) and (b) of the Constitution, which thus provide:

> *"In applying a provision of the Bill of Rights, a court shall –*
>
> *(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and*
>
> *(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom."*

[77] We see as the requisite manner to develop the principle in Article 81(b) of the Constitution into an enforceable right, setting it on a path of maturation through progressive, phased-out realization. We are, in this regard, in agreement with the concept urged by learned ***amicus*** Mr. Kanjama, that *hard gender quotas* such as may be prescribed, are immediately realizable, whereas *soft gender quotas,* as represented in Article 81(b) with regard to the National Assembly and Senate, are for *progressive realization*. We have also benefited in developing this line of reasoning, from the learned submission of Mr. Amollo for CAJ.

[78] This, we believe, answers the compelling question raised in contest to the case for progressivity, by learned counsel Mr. Nderitu and Ms. Thongori: *When will the future be,* as baseline of implementation of the gender-equity rule?

[79] Bearing in mind the terms of Article 100 [on promotion of representation of marginalised groups] and of the Fifth Schedule [prescribing time-frames for the enactment of required legislation], we are of the majority opinion that *legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.*

[80] The foregoing opinion is a basis for action in accordance with the terms of *Article 261(6), (7), (8)* and *(9)* under the "Transitional and Consequential Provisions" of the Constitution: by way of the High Court being duly moved to issue appropriate orders and directions.

[81] In the course of arriving at this Opinion we noted certain elements in the submission by counsel, in respect of which we will make a number of observations. Our remarks in this regard inclusively cover the related issues identified earlier, as meriting this Court's attention.

[82] It was contended that the progressive mode in the implementation of the gender-equity rule would run into conflict with the constitutional principle of the separation of powers: as the Courts would be straying into business falling to the Executive or Legislative Branch. It was being urged that the judicial approach must stand in favour of the accrued-right principle, and it should be held that there had been a breach of Article 81(b) of the Constitution. We are not, however, in agreement with this contention, as the provision in Article 27 (6) for the State to "take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups," presupposes open-ended schemes of decision-making and programming, which can only be effected over a span of time. By accommodating such prolonged time-spans of action by the Legislative and Executive Branches, the Judiciary by no means negates the principle of the separation of powers.

[83] The ultimate question was whether, if the Courts were to take the position that a breach of the Constitution would be entailed if the general elections of March 2013 did not yield the stated gender proportions in the membership of the National Assembly and Senate, it was conceivable that the relevant organs would in their membership, be held to offend the Constitution. We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the

primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution.

[83A] On the gender-equity issue, the Honourable The Chief Justice will read out a minority opinion.

H. PRESIDENTIAL ELECTION: JURISDICTION FOR RESOLVING DISPUTES NOT MENTIONED IN ARTICLE 140 OF THE CONSTITUTION

[84] The learned Attorney-General raises an issue of merit: as to whether an unsuccessful candidate in the first round of the Presidential election under Article 136 of the Constitution is or is not entitled to petition the Supreme Court to challenge the outcome under Article 140. There is a lacuna in the Constitution and, short of a suitable amendment being effected, in accordance with the detailed provisions of Chapter 16 thereof, it is the Supreme Court's responsibility to make such interpretation as will have the effect of upholding the meaning, intent and integrity of the Constitution as a whole. This is a typical occasion when this Court must provide guidance, as sought by the Attorney-General, for the purpose of upholding the authority of the Constitution.

[85] In relation to Presidential election, the basic provision is set out in Article 136 of the Constitution, as follows:

> *"(1) The President shall be elected by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating Presidential elections."*

The Constitution then provides (Article 140) for the resolution of such disputes as may arise from the conduct and outcome of the said election. The relevant provision thus reads:

> *"(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election."*

[86] There is a lacuna in the foregoing provision. Election of the President is a *process,* beginning from primary elections to the final election which will lead to the identification of the President-elect. Article 140(1) provides for dispute settlement only at the *final stage*, and not at earlier stages. With no provision on the mode of resolution of disputes at the earlier stages, there would be no express right to seek the Court's intervention, for instance, in respect of the runner-up position. Such a dispute may be, on the facts, one of merit and, therefore, one to be resolved judicially. The urgency of the issue would remain the same as that which attends dispute-settlement in relation to the position of the President-elect; and accordingly, this would still be a contest on *an issue of the Presidential election*. What is the proper jurisdiction for resolving such an issue?

[87] Counsel held differing viewpoints on the question. Learned counsel, Mr. Mwenesi for CMD submitted that the Supreme Court's jurisdiction is adequately provided for under Article 140, and that all matters not covered therein, and touching on the office of President, should be confined to the jurisdiction of the High Court under Article 165 of the Constitution. Learned counsel Mr. Arwa, for CIC, urged that the Constitution does not envisage any electoral challenge at the conclusion of the first round of elections; that any irregularities arising at earlier stages can only be contested at the end of the electoral process; and that when the first round of elections fails to produce an outright winner, then the electoral process is incomplete and cannot be challenged until after the conclusion of the second round.

[88] Similarly, Mr. Sing'oei for Katiba Institute, urges that a dispute at the first round which does not produce a President, will not be ripe for an invocation of the High Court's jurisdiction. Learned counsel submits that even though it is the Supreme Court that has exclusive jurisdiction in respect of Presidential-election disputes, this jurisdiction only takes effect upon declaration of a President-elect; and consequently, disputes arising before the last round should not be determined by the Supreme Court.

[89] ***Amicus curiae*** Mr. Kanjama, similarly, submits that disputes occasioned by the first round of Presidential elections properly belong to the *High Court's*

jurisdiction; and that the Supreme Court's jurisdiction should be held to be limited to the matters specified in Article 140.

[90] Learned counsel Mr. Amollo, for CAJ, by contrast, submits that an aggrieved person is entitled to petition the Supreme Court to challenge the outcome of the

first round of the Presidential elections; and that it is inapposite to adjudicate an election dispute at the final stage when it preceded the run-off election. Mr. Amollo urged that the Supreme Court should apply the provisions of Article 140 of the Constitution to the resolution of *all disputes* arising from the conduct of Presidential elections – whether or not this be expressly provided for.

[91] In agreement is learned counsel Mr. Mungai, for the International Centre for Constitutional Research and Governance. He submits that all candidates in the Presidential election have equal rights to contest the outcome; and in this regard, the first round of election is just as important as the second round. Counsel urges that the validity of the run-off election can only be properly determined when the Supreme Court has heard and determined any grievance relating to the first round. Only in this way, counsel urged, would the Supreme Court be able to deal fairly and conclusively with disputes arising from the process of Presidential election.

[92] A similar position is taken by learned counsel, Mr. Nyamodi for the IEBC; he urges that it is desirable the Supreme Court should resolve Presidential election

matters with finality, and should insulate petitions relating to such elections from the residual jurisdiction of the High Court.

[93] As signalled in this Court's first Advisory-Opinion application [***In the Matter of the Interim Independent Electoral Commission as the Applicant***, Sup.Ct. Const. Application No. 2 of 2011], an opinion will be given only in exceptional circumstances, when the various organs established under the Constitution are, for cause, unable to exercise their authority to resolve a major governance issue; when the issues involved are weighty and of constitutional significance; and when the public interest in the matter is manifest.

[94] We have read the many documents, including depositions and submissions lodged by the parties and by the ***amici curiae***; and we have attentively heard all the learned counsel. We are unanimously confirmed in our persuasion that the two issues referred to this Court by the Attorney-General who sought an Advisory Opinion, fall within the broad terms guiding us in rendering such an opinion.

[95] Several questions have emerged, which we must address:

(a) *under what circumstances does a dispute emerge, as contemplated in Article 140 of the Constitution?*

(b) *are there categories of potential disputes in respect of Presidential elections, other than those referred to in Article 140?*

(c) *how should the various categories of Presidential-election disputes be resolved?*

[96] Article 140(1) of the Constitution provides:

> *"A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election."*

It is clear that the aggrieved, in such a case, may be a *candidate* in the election, or indeed, *any other person*. The petitioner will be contesting the status of the President-elect: contesting the declaration of a certain candidate as President-elect (Article 138(1)); contesting the declaration from the first round of election – that a certain candidate has received more than half of all the votes cast in the first round of election and so this candidate is destined to be President-elect if the candidate meets other prescribed criteria; contesting the declaration that a certain candidate has won at least twenty-five per cent of the votes cast in each of more-than-half of the counties, and so this candidate is destined to be President-elect; contesting fresh Presidential elections held by virtue of Article 138(5), when the first round of elections results in no candidate being elected as President in accordance with Article 138(4) of the Constitution.

[97] It is clear that Article 140 of the Constitution makes no provision regarding the procedure to be followed where a dispute emanates from the fact that nobody is elected as President under Article 138(4), and when this fact leads to fresh elections under Article 138(5). When such is the case, it follows that there will be ***no*** President-elect.

[98] Article 138(5) provides that if no candidate is elected, a fresh election is to be held within 30 days after the earlier election: but in this fresh election, candidature is limited; only *two candidates* from all the original Presidential-election candidates will feature as candidates. These two candidates must be only those who obtained the greatest number of votes in the original Presidential election.

[99] Article 140 is silent on the mode of resolving such dispute as may arise in the course of ascertaining the two top candidates to proceed to the fresh Presidential elections. Such a dispute could, for instance, relate to the vote-tallying process: because the return is alleged to be invalid, or some related matter. Or one of the two candidates could be claiming to have fully met the requirement for being declared President-elect [Article 138(4)] and so there is no need to go to fresh election. If the return for the first round of Presidential election is *disputed*, is it tenable that the second-round, fresh election can be held? It would not be fair – and this would aggrieve the complainant, apart from undermining the legitimacy of the electoral process. Clearly, this Court must stand on the side of fairness, legitimacy and constitutionality.

[100] It is clear to us, in unanimity, that there are potential disputes from Presidential elections *other than* those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections,

is not lodged in a *single event*; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for "qualifications and disqualifications for election as President" – and this touches on the tasks of agencies such as *political parties* which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of *the Presidential election*.

[101] Does the *entire question* concerning Presidential elections belong to the Supreme Court's jurisdiction? Or is the Supreme Court's power limited by the express language of Article 140 of the Constitution? An analogy may be drawn with other categories of elections; **Article 87(2),** on electoral disputes, thus provides:

> *"Petitions concerning an election,* ***other than a Presidential election****, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission."*

It is clear that ***Presidential elections*** have separate provisions, in Article 163(3)(a) which provides:

> *"The Supreme Court shall have –*

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140……"

On a literal construction, it may be stated that the foregoing reference to "the *elections* to the office of President" suggests the draftspersons contemplated that *several* rounds of election may be involved, before the emergence of a duly elected President.

[102] Besides, a reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon ***all*** such disputes as would arise from *the Presidential election*. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising *after* the election – while excluding those disputes which might arise *during* the conduct of election.

[103] From our conclusion on the foregoing point, a practical problem arises, in respect of which we will express an opinion: ***Must*** the second round of Presidential elections be held within ***30 days,*** regardless of whether there is a justiciable dispute as to the conduct of the first round? For instance, regardless of the fact that the return of the first round is disputed?

[104] It is our unanimous opinion that the validity of the Presidential election is not for determination only *after* the administrative pronouncement of the final

result; *at any stage* in the critical steps of the electoral process, the Supreme Court should entertain a dispute as to validity.

[105] Such a position would have implications for the time-lines prescribed under the Constitution; and it is proper to give a further opinion in this regard. Is it practicable to conduct a second round of Presidential elections within 30 days, in accordance with Article 138(5) of the Constitution, even when the first round of elections is disputed?

I. OPINION ON THE SUPREME COURT'S JURISDICTION AT THE SEVERAL STAGES IN THE PRESIDENTIAL ELECTION

[106] A purposive approach would take into account, firstly, the agonized history attending Kenya's constitutional reform; secondly, the crucial importance of the electoral process in the current constitutional dispensation; and thirdly, the overwhelming case for free, fair and efficiently-conducted elections. In this context, ***Presidential-election disputes, in their whole range, should be impartially and expeditiously resolved by the Supreme Court as the ultimate judicial body, within practical time-lines to be read into Article 138(5); and in our unanimous opinion, in the event of a second round of election, the words "within thirty days after the previous election" should be read to mean thirty days from the date on which disputes in respect of the first round will have been resolved. Within such guidelines, the Supreme Court, acting by***

virtue of its rule-making powers under Article 163(8) of the Constitution, would establish more specific, and efficient time-lines to guide the hearing of first-round election disputes.

[107] ***This opinion, on the second question raised by the Attorney-General, gives an indication of the course of practice, in the absence of any relevant constitutional change, or new legislation on the subject.***

DATED and **DELIVERED** at **NAIROBI** this 11th day of December, 2012.

.....	.....
W.M. MUTUNGA	P.K. TUNOI
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT
.....	.....
J.B. OJWANG	S.C. WANJALA
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT

.....

N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true
Copy of the original

Ag. REGISTRAR
SUPREME COURT OF KENYA